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Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF TRW INC.

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SUMMARY

TRW Inc. ("TRW") supports the Commission's proposal, pursuant to the Omnibus Budget Reconciliation Act of 1993, to establish a comprehensive framework for the regulation of mobile radio services. In particular, TRW urges the Commission to finalize its tentative conclusion that it should continue to use its existing procedures for determining whether to authorize the provision of space segment capacity by satellite systems on a non-common carrier basis. With respect to providers of Mobile Satellite Service/Radiodetermination Satellite Service ("MSS/RDSS"), such as TRW, non-common carrier authority would be fully in keeping with Section 332(c)(5) of the Communications Act of 1934 ("the Act"), and with Commission precedent. It would also be appropriate, in that the provision of MSS/RDSS space segment capacity to persons other than end users does not constitute a "commercial mobile service."

Non-common carrier treatment of MSS/RDSS would pose no danger of anticompetitive behavior, because the Commission is committed to an MSS/RDSS service that is characterized by vigorous competition among multiple entrants. Non-common carrier regulation would also promote the public interest, in that it would keep satellite system licensees on an equal footing with

foreign competitors who are not subject to such regulation, deter the imposition of restrictive regulations on licensees by other nations, and stimulate foreign investment in such licensees.

TRW asks the Commission to clarify that, in proposing to subject to common carrier regulation only commercial mobile satellite services that are provided to "end users," it intends to treat as common carriage only those MSS/RDSS services that are provided directly to "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public." TRW also requests clarification that providers of space segment capacity and resellers of that capacity who do not provide service directly to "end users" will not be treated as common carriers. In addition, TRW asks the Commission to recognize that some MSS/RDSS services, even if provided directly to end users, will nevertheless constitute "private mobile service" when they either do not satisfy all of the definitional criteria of a commercial mobile service or are not the "functional equivalent" of a commercial mobile service.

TRW supports the Commission's proposal to forbear from Title II regulation of those MSS/RDSS services that may be commercial mobile services to the maximum extent permitted under Section 332 of the Act. Competition will be sufficiently vigorous among MSS/RDSS systems and other mobile services

providers that forbearance would present no danger to the public interest, and abstention from stifling regulation is critical to the survival of the nascent MSS/RDSS industry.

Finally, TRW supports the Commission's proposal to preempt state regulation of the right to intrastate interconnection with Local Exchange Carriers ("LECs") and of the type of interconnection, and concurs with the Commission that permitting state regulation of the right to and type of interconnection would negate the important federal purpose of ensuring interconnection to the interstate network. TRW urges the Commission to preempt state and local regulation of interconnection rates for MSS/RDSS services, and calls upon the Commission to ensure that providers of MSS/RDSS space segment capacity have the right to interconnect with LEC facilities so that they may compete effectively in the mobile services marketplace.

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To: The Commission

COMMENTS OF TRW INC.

TRW Inc. ("TRW"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby comments on the Commission's Notice of Proposed Rule Making in the above-captioned docket, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 93-454 (released October 8, 1993) ("Notice"). In the Notice, the Commission proposes to implement Sections 3(n) and 332 of the Communications Act of 1934 ("the Act"), as amended by the Omnibus Budget Reconciliation Act of 1993,[1/] to create a comprehensive framework for the regulation of mobile radio

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1/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 395 (1993) (to be codified at 47 U.S.C. §§ 153(n) and 332) (hereinafter "47 U.S.C. §§ 153(n) and 332").

services. The Commission tentatively concludes, inter alia, that it should continue to use its existing satellite-industry procedures in order to authorize mobile satellite service operators to offer space segment capacity for the provision of mobile service on a non-common carrier basis. TRW strongly supports this conclusion, which is fully in keeping with Section 332(c)(5) of the Act, and urges its final implementation.

I. INTRODUCTION

On May 31, 1991, TRW filed an application with the Commission for authority to construct "Odyssey," a non-geostationary telecommunications satellite system for the provision of service in what are now the mobile satellite service/radiodetermination satellite service bands (the "MSS/RDSS bands") (1610-1626.5 MHz and 2483.5-2500 MHz). See Application of TRW Inc. (File Nos. 20-DSS-P-91(12) and CSS-91-015) ("TRW Application").[2/] In its application, TRW explicitly sought non-common carrier status for its proposed system.[3/]

2/ "Odyssey" is a trademark of TRW Inc. Odyssey is a satellite telecommunications system which is to be comprised of a constellation of twelve satellites in medium Earth orbit.

3/ TRW Application at 22. The first of the six pending applications for authority to establish an MSS/RDSS band satellite system was filed in November 1990. Last year, the Commission proposed to allocate spectrum for the MSS/RDSS service (consistent with the results of the 1992 World

(continued...)

The Commission proposes in its Notice to establish a regulatory framework for all mobile radio services.[4/] As part of that framework, the Commission also proposes interpretations of the Act's definitions of "commercial mobile service"[5/] and "private mobile service"[6/] that would govern whether or not a service would be subject to regulation as a common carrier. In addition, the Commission proposes to forbear from applying certain provisions of Title II of the Act to commercial mobile services,[7/] and to preempt certain state regulation of both commercial and private mobile services.[8/]

TRW urges the Commission to consider the unique character of the MSS/RDSS service as it establishes the proposed regulatory structure for mobile services. In particular, the provision of MSS/RDSS space segment capacity constitutes a new

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3/ (...continued)
Administrative Radio Conference) but has yet to finalize that allocation. See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-geostationary Satellites, 7 FCC Rcd 6414 (1992) ("MSS/RDSS Band Allocation NPRM"). The Commission also has yet to propose service and technical rules for MSS/RDSS.

4/ Notice, FCC 93-454, slip op. at 1.

5/ Id. at 3-10.

6/ Id. at 10-12.

7/ Id. at 22-25.

8/ Id. at 26, 28.

and distinct type of mobile service that does not fit neatly into the "to-the-public" focus of Congress's amendments to the Act. Congress recognized this discrepancy for mobile-satellite services in general, and provided the Commission with the express ability to continue treating such services on a non-common carrier basis. The attributes of the MSS/RDSS service -- including its inherently global nature and the fact that there will be multiple licensees -- support the Commission's tentative determination to treat the provision of MSS/RDSS space segment capacity to service providers as a non-common carrier activity.

Unlike most mobile services, which are comprised of local systems or of the aggregations of groups of local systems into a regional or national service, the MSS/RDSS service will be inherently national -- indeed, global -- in scope. The construction, launch and operation of a constellation of satellites in non-geostationary orbit necessarily involves both international coordination and attention to international economic considerations that are not present in most terrestrial mobile services contexts.

As the Commission has acknowledged in the past, the risks involved in satellite communications are necessarily more

pronounced than in other services.[9/] There are technical risks because of the possibility of launch, satellite or transponder failure. In addition, the operator has to make large financial commitments, most of which must be paid years in advance of the time the system becomes available. The entire process is often complicated by the fact that market conditions for a new satellite service are often difficult accurately to predict in advance.[10/]

Since the dawn of the commercial satellite age some twenty years ago, the Commission has endeavored to minimize the regulatory constraints to which new satellite services are subject, in order to maximize the flexibility of operators to develop new service offerings that are market-appropriate. In its Notice, the Commission recognized that services such as the MSS/RDSS could be harmed by the imposition of common carrier regulation, and has proposed to utilize the flexibility Congress granted it to continue its practice of making common carrier regulation decisions on a service-by-service basis.[11/]

9/ Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238, 1251 n.29 (1982) ("Transponder Sales"), aff'd sub nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

10/ See id.

11/ See Notice, FCC 93-454, slip op. at 16-17.

With regard to the MSS/RDSS service, a decision to treat the provision of MSS/RDSS space segment capacity to service providers as "commercial mobile service" could put U.S. satellite licensees at a disadvantage with respect to foreign competitors, discourage foreign investment and deter international cooperation in the satellite field. The technical and financial risks involved in any satellite system, and especially in a service as new and innovative as MSS/RDSS, make it all the more important that investors not be discouraged from participation by excessive and premature regulatory restrictions.

To avoid causing unnecessary and undue harm to the fledgling MSS/RDSS industry, TRW, in these Comments, calls upon the Commission: (1) to apply its longstanding policies and authorize MSS/RDSS licensees to offer space segment capacity for the provision of mobile service on a non-common carrier basis; (2) to clarify that, in proposing to subject to common carrier classification only satellite services that are provided to "end users," the Commission intended to regulate as commercial mobile services only those MSS/RDSS services that are provided directly to "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public;" (3) to clarify that providers of space segment capacity and resellers of that capacity who do not provide service directly to

"end users" will not be treated as common carriers; (4) to find that certain MSS/RDSS services provided directly to end users constitute private mobile service (i.e., do not satisfy all of the elements of the definition of commercial mobile service) and therefore should not be regulated as common carriage; (5) to forbear from Title II regulation of those MSS/RDSS services that may be commercial mobile services to the maximum extent permitted under Section 332 of the Act; and (6) to preempt state and local regulation of interconnection rights, terms, conditions and rates for MSS/RDSS.

II. THE COMMISSION SHOULD USE ITS EXISTING PROCEDURES TO AUTHORIZE MSS LICENSEES TO OFFER SPACE SEGMENT CAPACITY ON A NON-COMMON CARRIER BASIS.

TRW strongly supports the Commission's tentative decision to continue to employ its existing procedures for determining whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.[12/] The Commission's conclusion is firmly grounded in the Act, and in Commission and court precedent.

12/ Id. at 16-17.

A. Congress Authorized The Commission To Treat Mobile Satellite Service Providers As Non-Common Carriers.

Under Section 332(c)(5) of the Act, Congress provided that "[n]othing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage."[13/] The Joint Explanatory Statement of the Committee of Conference ("Explanatory Statement") specified that the Commission may continue to use its existing procedures to make that determination.[14/] Congress thereby authorized the Commission to use its established policies for determining the appropriate regulatory treatment for satellite licensees that offer space segment capacity.

B. The Commission Has A Longstanding Policy Of Authorizing The Provision Of Space Segment Capacity To Service Providers On A Non-Common Carrier Basis.

The Commission has authorized numerous applications for satellite systems designed to offer space segment capacity for the provision of service on a non-common carrier basis.

13/ 47 U.S.C. § 332(c)(5).

14/ H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993), reprinted in 1993 U.S.C.C.A.N. (107 Stat.) 1088, 1183.

Non-common carrier operation of space segment facilities was contemplated by the Commission as early as 1970, when the Commission informed applicants for domestic satellite ("domsat") space station licenses that they were permitted to propose private ownership and use of satellite systems.[15/] Between 1973 and 1981, the Commission authorized several space stations that were not in the traditional common carrier mold.[16/]

In its 1982 decision in Transponder Sales, the Commission granted the applications of domsat space station licensees to engage in the sale of discrete transponders on their authorized satellites on a non-common carrier basis. Because of the great technical and financial risks involved in launching a satellite system, the Commission found that closer cooperation and the establishment of long-term commitments between system operators and users via non-common carrier arrangements offered a host of public interest benefits. Those benefits were found to include the encouragement of additional satellite entry, additional facility investment and more efficient use of the

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15/ See Transponder Sales, 90 F.C.C.2d at 1248 (citing Establishment of Domestic Communication - Satellite Facilities by Nongovernmental Entities, 22 F.C.C.2d 86 (1970)).

16/ See, e.g., Western Union Telegraph Co., 86 F.C.C.2d 196 (1981); GTE Satellite Corp., 43 F.C.C.2d 1141 (1973).

orbital and frequency spectrum.[17] In addition, the Commission found that such systems allowed for technical and marketing innovation in the provision of domsat services.[18]

In its 1985 Report and Order on the establishment of separate satellite systems,[19] the Commission held that the authorization of satellite systems providing international communications services separate from INTELSAT and operating as non-common carriers would be in the public interest.[20] The Commission concluded that the systems under its consideration were barred from operating as common carriers by restrictions imposed by the Executive Branch. It stated that "the sale or long-term lease of satellite transponders by satellite owners is

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17/ Transponder Sales, 90 F.C.C.2d at 1255.

18/ Id. In Martin Marietta Communications Systems, Inc., 60 R.R.2d 779 (1986) ("Martin Marietta"), the Commission determined that domsat licensees should be routinely authorized to offer transponders on a non-common carrier basis absent a showing that such an offering would not be in the public interest. The Commission held that it could fulfill its public interest obligation by determining that granting a particular application would not unduly reduce the availability of satellite transponders offered on a common carrier basis. Id. at 781.

19/ Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985) ("Separate Systems"), recon. granted in part, 61 R.R.2d 649, further recon. denied, 1 FCC Rcd 439 (1986).

20/ Separate Systems, 101 F.C.C.2d at 1049.

a factor supporting a determination that the offering does not constitute common carrier activity."[21/]

In its 1986 decision establishing the radiodetermination satellite service ("RDSS") in what are now the MSS/RDSS bands, the Commission declined to impose common carrier obligations on the new service.[22/] It agreed with the assertions of the applicants and others "that RDSS offerings must be permitted to be tailored to meet the needs of individual customers and that common carrier obligations will impede this ability."[23/]

As recently as October 1993, the Commission applied its policy of authorizing space segment providers to operate as non-common carriers to applications involving mobile satellite service providers. In the News Release for its as-yet unreleased decision establishing licensing and operating procedures for the new non-voice, non-geostationary ("NVNG") mobile satellite service -- a decision which will mark the Commission's first action in the satellite field since Congress amended the Act -- the Commission stated that NVNG space station licensees will be

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21/ Id. at 1103.

22/ Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, 104 F.C.C.2d 650, 665-66 (1986).

23/ Id. at 666.

permitted to provide system access to commercial mobile services providers on a non-common carriage basis.[24/]

C. Non-Common Carrier Treatment For MSS/RDSS Systems Is Consistent With The Public Interest.

TRW supports the Commission's tentative conclusion that the public interest would be served by the continued use of its existing procedures for determining whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.[25/] Indeed, there are many reasons why the public interest requires that MSS/RDSS licensees should be permitted to offer space segment capacity to service providers on a non-common carrier basis.

First of all, the Commission is firmly committed to the establishment of an MSS/RDSS service that is characterized by multiple entry and meaningful intraservice competition.[26/] With a competitive service, any inefficiencies in price or quality of service from any one MSS/RDSS system will quickly

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24/ See News Release, Report No. DC-2518, Licensing and Operating Procedures for the Non-Voice, Non-Geostationary Mobile Satellite Service Established (CC Docket 92-76), at 2 (October 21, 1993) ("NVNG News Release").

25/ Notice, FCC 93-454, slip op. at 16-17, 16 n.61.

26/ See MSS/RDSS Band Allocation NPRM, 7 FCC Rcd at 6417.

result in a migration of business from that system to the remaining providers. Common carrier regulation of MSS/RDSS is unnecessary under these conditions to ensure the ability of consumers to gain access to services; if demand exists, the efficient and market-responsive operator will find a way to meet it. Indeed, service flexibility and innovation could well be hobbled by a requirement that all systems indiscriminately serve the public.

In addition, the imposition of the regulatory burdens associated with common carriage on U.S. MSS/RDSS licensees would also put such licensees at a competitive disadvantage with foreign competitors who are not subject to such regulation. The international market for mobile satellite services is becoming intensely competitive.[27/] Any regulation that inhibits the ability of the U.S. systems to compete effectively in the global marketplace, or that could be construed as encouraging retaliatory regulation overseas, should be eschewed.

Mandatory common carrier regulation of MSS/RDSS space segment providers would have another undesirable effect -- it would subject such providers to the foreign ownership

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27/ INMARSAT, Russia, Tonga and others have advance-published global systems that would provide services in competition with the U.S. MSS/RDSS systems.

restrictions of 47 U.S.C. § 310(b).[28/] Such restraints could limit the availability of capital for the development and growth of satellite ventures, and could unnecessarily reduce the flexibility of satellite operators to design creative ownership and marketing structures to maximize the benefits of their inherently international service capabilities. Indeed, in a separate statement released with the NVNG News Release (see note 24, supra), Commissioner Barrett specifically cited the prospect of foreign investment in the new NVNG MSS service as a positive by-product of the Commission's decision to regulate the service on a non-common carrier basis. Employing a rationale that is equally applicable to the MSS/RDSS service, Commissioner Barrett stated that:

> The [NVNG MSS] Order also classifies this service as non-common carrier, which will permit [the] proponents to obtain foreign investment capital in developing their service plans. Given the international nature of these proposed systems, I believe this flexibility is an important component of our rules today. Our [non-geostationary satellite] service providers will need to pursue international coordination efforts where their services extend beyond the U.S. Thus, the potential for private foreign investment in their systems could be a useful

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28/ 47 U.S.C. § 310(b). Under that section, foreign equity investment in certain radio station licensees is restricted, and foreign participation in the management of such licensees is also limited.

mechanism to facilitate access in other markets.[29/]

In short, by imposing common carrier regulation (and the attendant effects of 47 U.S.C. § 310(b)) on an emerging technology such as MSS/RDSS, the Commission would strictly limit the benefits that the public will be able to derive from that technology. As explained in Sections II.D. and II.E.1-3 below, the provision of MSS/RDSS space segment capacity to service providers is not an inherently common carrier activity. In any event, non-discriminatory treatment is ensured by the establishment of a competitive service, and non-common carrier regulation would stimulate desirable foreign investment and deter the imposition of retaliatory regulation by other nations. The public interest thus clearly requires the Commission to conclude that the provision of MSS/RDSS space segment capacity may, under its application policies, be effected on a non-common carrier basis.

29/ NVNG News Release, Separate Statement of Commissioner Andrew C. Barrett, at 1.

D. The Provision Of Satellite Capacity For MSS/RDSS To Service Providers Does Not Constitute Commercial Mobile Service.

As the Commission observes in its Notice, commercial mobile service is treated as common carriage under the Act.[30/] The Act defines commercial mobile service as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[31/]

Private mobile services, in contrast, are not subject to common carrier regulation.[32/] The Act defines private mobile service as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[33/]

30/ Notice, FCC 93-454, slip op. at 1; 47 U.S.C. § 332(c)(1)(A).

31/ 47 U.S.C. § 332(d)(1).

32/ 47 U.S.C. § 332(c)(2).

33/ 47 U.S.C. § 332(d)(3). TRW supports the Commission's proposal (see Notice, FCC 93-454, slip op. at 10-11) to regulate as a private mobile service any mobile service that is definitionally a commercial mobile service, but that is not the functional equivalent of a commercial mobile service. TRW believes that the Commission should refrain from unnecessary regulation wherever possible, and submits

(continued...)

The provision by MSS/RDSS systems of space segment capacity to service providers does not meet the Act's definition of a commercial mobile service. Although the licensees will make space segment capacity available on a for-profit basis, their service-provider customers cannot reasonably be described as having been provided "interconnected service" or as "the public" (or "such classes of eligible users" as to effectively constitute "a substantial portion of the public") to which the Congress addressed its concerns.

1. An MSS/RDSS System That Provides Space Segment Capacity To Service Providers Is Not Serving "The Public" Or A Class of Eligible Users That Effectively Constitutes "A Substantial Portion Of The Public."

TRW supports the Commission's view that making "interconnected service" available to "the public" in Section 332(d)(1) connotes the offer of such service "to the public without restriction, as existing common carrier services are offered."[34/] In classifying communications common carriers, the Commission has long employed the standard established by the

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33/ (...continued)
that a service which is not the functional equivalent of a commercial mobile service does not raise the public interest concerns which common carrier status was designed to address.

34/ Notice, FCC 93-454, slip op. at 8.

Court of Appeals in NARUC I.[35/] The court in NARUC I held that "[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently.'"[36/] Such an undertaking is surely what Congress meant to subject to the strictures of Title II in Section 332(d)(1).[37/]

Further support for this interpretation can be found in the Commission's previous decisions. In seeking to classify the proposed sale or lease of transponders by satellite system licensees in Transponder Sales, the Commission cited with approval the finding of the court in NARUC I that "'the

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35/ National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.) ("NARUC I"), cert. denied, 425 U.S. 992 (1976). Commission decisions employing the NARUC I standard include: Transponder Sales, 90 F.C.C.2d at 1248, 1255-57; Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, 104 F.C.C.2d 650, 665-66 (1986).

36/ NARUC I, 525 F.2d at 641 (citations omitted).

37/ NARUC I also provides a ready response to the Commission's request for comment on the types of services which should be deemed "effectively available to a substantial portion of the public" even though they are not offered to the general public without restriction. The NARUC I court observed that, to be a common carrier, one need not make one's services "available to the entire public." NARUC I, 525 F.2d at 641. Rather, it is enough that one "hold oneself out indiscriminately to the clientele one is suited to serve." Id. As the court's formulation has become central to the Commission's historical understanding of the term "common carrier," it is logical to conclude that Congress must have intended to refer to that formulation when it selected the phrase "effectively available to a substantial portion of the public" for inclusion in Section 332(d)(1).

characteristic of holding oneself out to serve indiscriminately appears to be an essential element'" of common carriage.[38/] The Commission also noted the court's conclusion that an entity will not be a common carrier "'where its practice is to make individualized decisions, in particular cases, where and on what terms to deal.'"[39/] Commission likened the sale of transponders under its consideration to the services offered by operators of Specialized Mobile Radio Systems that were at issue in NARUC I, holding that "[s]table, long-term contractual offerings to individual customers of technically and operationally distinct portions of a satellite system fall far short of the indiscriminate holding out contemplated in the NARUC I decision."[40/] For that reason, the Commission concluded that the transponder sales in question should not be regulated as common carriage.

In selling or leasing space segment capacity to mobile services providers, MSS/RDSS systems will likewise arrange each sale or lease on the basis of individualized negotiations. While the existence of a competitive market for MSS/RDSS space segment capacity will ensure the availability of such capacity on a

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38/ Transponder Sales, 90 F.C.C.2d at 1255 (citation omitted).

39/ Id. (citation omitted).

40/ Id. at 1256-57.